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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. ~~77-~~1086

EDWARD KERR, Police Director, City of Newark (on leave) and ANTHONY BARRES, Acting Police Director, City of Newark and the CITY OF NEWARK,

Petitioners,

vs.

RONALD GASPARINETTI, and POLICEMEN'S BENEVOLENT ASSOCIATION, LOCAL NO. 3,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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EDWARD KERR, Police Director, City of Newark (on leave) and ANTHONY BARRES, Acting Police Director, City of Newark and the CITY OF NEWARK,

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vs.

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Introductory Statement

The Petitioners, Edward Kerr, Anthony Barres and the City of Newark, respectfully pray that a writ of certiorari

issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on November 3, 1977.

Opinions Below

The opinion of the Court of Appeal's, as yet unreported, appears in Appendix A. The opinion of the District Court for the District of New Jersey, is unreported, and appears in Appendix C.

Jurisdiction

The judgment of the Court of Appeals, which is found in Appendix B, was entered on November 3, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and 28 U.S.C. §2101(c).

Questions Presented

1. Whether Chapter 3:1.2-5 (Derogatory Reference) of the departmental regulations of the Newark Police Department which prohibits a police officer from making derogatory references or derogatory remarks about departmental orders or instructions violates the First Amendment guarantee of freedom of speech.

2. Whether Chapter 3:1.2-8 (Censuring Official Transactions) of the departmental regulations of the Newark Police Department which prohibits a police officer either verbally or in writing from censuring other department members relating to official business violates the First Amendment guarantee of freedom of speech.

3. Whether Chapter 6:7 (Public Disparagement) of the departmental regulations of the Newark Police Department which prohibits a police officer from publicly disparaging or commenting unfavorably or disrespectfully upon the official actions of a superior officer or upon the rules, regulations and procedures of the Department violates the First Amendment guarantee of free speech.

4. Whether the aforementioned Chapters 3:1.2-5, 3:1.2-8 and 6:7 of the departmental regulations of the Newark Police Department are unenforceable because they are unconstitutionally vague and/or overbroad in violation of the First and Fourteenth Amendments of the United States Constitution.

Constitutional Provisions Involved

Constitution of the United States, Amendment I:

> "Congress shall make no law . . . abridging the freedom of speech . . ."

Constitution of the United States, Amendment XIV:

> ". . . nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Departmental Regulations Involved

Chapter 3:1.2-5—Derogatory Reference:

> "Police Officers . . . shall not by manner, gesture or speech criticize or make derogatory reference to Department orders or instructions either to the public or to other members of the Department."

CHAPTER 3:1.2-8—CENSURING OFFICIAL TRANSACTION:

> "Unless in accord with official duties, police officers . . . shall not, either in writing or discussion, censure other Department members concerning official transactions within the Department."

CHAPTER 6:7—PUBLIC DISPARAGEMENT:

> "Department members shall not publicly disparage or comment unfavorably or disrespectfully on the official action of a superior officer, nor on the Rules Regulating Procedures or Orders of the Police Department."

Statement of Facts

The Petitioners are the Police Director (on leave) and Anthony Barres, the Acting Police Director of the City of Newark, New Jersey and the City of Newark as a legal entity.

Respondent, Ronald Gasparinetti, is a police officer with the Newark Police Department. He is presently on special assignment as he now holds the office of President of Patrolmen's Benevolent Association Local No. 3.

Respondent, Patrolmen's Benevolent Association Local No. 3 is the exclusive collective bargaining agent for all police officers who are employed by the City of Newark.

During January of 1973 a controversy arose within the City of Newark over the proposed construction of the "Kawaida Towers" housing project in the predominantly white North Ward section of the City. Passions were aflame, there was picketing by both proponents and opponents of the housing project and racial tensions within the City were generally at their highest level since the

Newark riots of July 1967. Moreover, several civilians were injured during the picketing, which occurred on a daily basis, around the proopsed site, for several weeks.

The Newark police were assigned the task of trying to keep order at the site of the proposed housing project. This proved to be a most difficult undertaking in view of the racial passions which had been aroused. Both the opponents and proponents of the project believed that the police were not doing enough for their side. The police were "caught in the middle." Several policemen were injured while trying to keep order at the site and the City of Newark had to go to Court in an effort to limit the picketing.

The Newark police assigned the primary responsibility for keeping order at the proposed site to the Tactical Force of its Patrol Division. Heading the Tactical Force at the time was Inspector Thomas Critchley.

When the dispute over the construction of "Kawaida Towers" had subsided, Deputy Police Chief Thomas Henry transferred 6 members of the Tactical Force to other assignments within the Department. Deputy Chief Henry was and still is in charge of the Patrol Division.

On April, 1 1973, an article appeared in the Star Ledger, a newspaper of general circulation within the City of Newark, wherein Respondent Gasparinetti was quoted as making disparaging remarks about Inspector Critchley and Deputy Chief Henry.

Respondent, Gasparinetti, alleged in the article that the transfer of the 6 police officers were the result of "pressure brought on Police Inspector Critchley by Le Roi Jones Imamu Amiri Baraka)" and that Critchley and Henry were out to "break the morale and spirit of the men" and had practiced "deceit and lies". Mr. Baraka is a well known Black activist.

In another press release which appeared in the Star Ledger on April 4, 1973, Respondent, Gasparinetti, allegedly repeated his charges but added that "The public wants to know why the police department doesn't do its job. Well, this is a very big part of the answer. We have the men that are willing to face the criminals but when they are led by superiors like Critchley they hesitate."

Referring to picketing by police officers in front of Newark City Hall, on April 3, 1973, Gasparinetti allegedly said: "We picketed to let people know we have cowards in superior officer ranks." These were obvious references to Inspector Critchley, Deputy Chief Henry and the "Kawaida Towers" dispute.

Gasparinetti made the same remarks in an undated Local No. 3 Newsletter and an undated Union Notice both of which were widely circulated.

It should be noted that these remarks were never substantiated by Gasparinetti.

Petitioners would also like to point out to the Court that during this same period there were well known incidents within the City of Newark at Vailsburg High School and at the construction site of the New Jersey Medical College. As with Kawaida there was picketing involved and the confrontations at those sites had overtones that were racial in nature.

On April 12, 1973, Gasparinetti was lawfully ordered by Inspector George Graf, of the Internal Affairs Division of the Newark Police Department, to submit a report relating to his alleged remarks which appeared in the Star Ledger. Gasparinetti refused to obey the order.

On September 13, 1973, the Police Department brought departmental charges against Gasparinetti charging violations of its Rules and Regulations. The text of those charges appear in opinions of the District Court and Court of Appeals, which are part of the Appendix. In short, Gasparinetti was charged mainly with violations of Chapters 3:1.2-5, 3:1.2-8 and 6:7 of the Rules and Regulations.

The District Court struck down Chapters 3:1.2-5 and 3:1.2-8 as unconstitutional but upheld the constitutionality of Chapter 6:7.

The Court of Appeal's, by a 2 to 1 decision, affirmed the District Court's finding that Chapters 3:1.2-5 and 3:1.2-8 were unconstitutional but also reversed the District Court and struck down Chapter 6:7 as unconstitutional.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals decision directly conflicts with this Court's decision in *Pickering* v. *Board of Education.*

In *Pickering* v. *Board of Education,* 391 U.S. 563, 88 S. Ct. 173, 20 L. Ed. 2d 811 (1968), this Court recognized that government may regulate the freedom of speech of its employees so long as it is necessary to accomplish a legitimate governmental concern. A majority of the Court of Appeals in the present case recognized that legitimate governmental concerns do exist but struck down the regulations at issue here as entirely too restrictive an enforcement of legitimate governmental concerns. Petitioners emphatically disagree.

It is now well recognized that government has an interest in restricting speech by its employees in order to

promote efficiency of public services performed by those employees. There is also recognized that the public employee, as private citizen, has a legitimate right to comment upon matters of public interest. However, a *balance* must be struck between the rights of government and the rights of the public employee as private citizen. Whether government or the public employee has tipped that balance is a matter to be judged on the facts of each case. *Pickering, supra,* at 20 L. Ed. 2d p. 817.

The Newark Police Department is a para-military organization built around rigid discipline, wearing of uniforms, saluting the flag and obeyance of orders. *Kelley* v. *Johnson,* 425 U. S. 238, 96 S. Ct. 1440, 47 L. Ed. 2d 708 (1976); *City of Newark* v. *Massey,* 93 N. J. Super. 317, 323 (App. Div. 1967). It must foster loyalty, efficient job performance and obedience to superior officers. If the decision of the Court of Appeals is allowed to stand this may prove an almost impossible task in Newark. What the Court of Appeals has done, is allow superiors to be criticized by the rank and file and allow discipline to become a mirage even during crises periods.

The provisions of the Hatch Act (5 USCA §7324(a)(2) forbidding federal employees to "take an active part in political management or in political campaigns" was at issue in *CSC* v. *Letter Carriers,* 413 U. S. 548, 93 S. Ct. 2880, 37 L. Ed. 2d 796 (1973). This Court found that such a provision did not constitute an unconstitutional abridgement of freedom of speech because of the important governmental interests sought to be served by a limitation of political activities by public employees. This Court emphasized that limitations on political activities by public employees reduced hazards to fair and effective government and help maintain public confidence in our system of government. Moreover, public employees should

carry out their duties objectively and without bias and not in accordance with their own beliefs or the beliefs of a political party. Id. at 37 L. Ed. 2d at pp. 808-809.

It is submitted that these considerations are even more present when the statements of a police officer, who is also the head of the local police union, are involved. The highly inflammatory statements of Respondent, Gasparinetti, struck right at the heart of effective discipline within the Newark Police Department. How can public confidence in the police be maintained if statements such as those made by Gasparinetti can go unpunished. Gasparinetti was not being fair and objective but was using his position as a police officer to express his personal beliefs. Surely this Court in *Pickering* did not have in mind that such statements should be protected.

It is also submitted that the Court of Appeal's holding in this case is counter to its opinion in *Sprague* v. *Fitzpatrick,* 546 F. 2d 560, 565 (3rd Cir. 1976) where that court, citing *Pickering,* sustained the dismissal of a federal employee for publicly criticizing his superior.

The time, place and circumstances of Gasparinetti's remarks and their particular recklessness were factors that should have been considered by the majority in the Court of Appeal's decision but were not. Inflammatory remarks by a police officer during a riot were adjudged not constitutionally protected in *Meehan* v. *Macy,* 392 F. 2d 822 (D. C. Cir. 1968). See also, *State* v. *Laird,* 353 F. Supp. 1392 (District of Col. 1972); *Callison* v. *United States,* 413 F. 2d 133 (9th Cir. 1969).

2. Chapters 3:1.2-5 and 3:1.2-8 of the Newark Police Department Rules and Regulations are not unconstitutionally overbroad.

Both the District Court and Court of Appeals struck down Chapters 3:1.2-5 and 3:1.2-8 as "overbroad".

A statute or regulation is unconstitutionally "overbroad" if "it offends the constitutional principle that a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *Swickler* v. *Koota,* 389 U. S. 241, 88 S. Ct. 391, 19 L. Ed. 2d 444 (1967); *Flynn* v. *Giarrusso,* 321 F. Supp. 1295 (E. D. La. 1971).

The Courts below drew a distinction between public criticism of superiors by a police officer and private criticism, among police officers, of superiors. It is respectfully submitted that each form of criticism is equally as dangerous and equally as disruptive of effective discipline within a police department.

The considerations enunciated in *Pickering, supra* and *CSC* v. *Letter Carriers, supra,* are just as prevalent whether the inflammatory statements are made in public or private. The police department is no less a para-military organization built around discipline and obedience to orders. Private disparagement of superiors is just as disruptive of morale and may also constitute a decision by a police officer to enforce the law in accordance with his own personal beliefs. Moreover, private criticism may just as easily impair public confidence in the police.

3. Chapter 6:7 of the Newark Police Department Rules and Regulations is neither unconstitutionally overbroad nor vague.

The District Court sustained this regulation as not sweeping too broadly because it prohibited only *public* comment and not private comment. The Court of Appeals, with Judge Rosenn dissenting, reversed the District Court and held that Chapter 6:7 was, as with the previously mentioned regulations, overbroad.

It is respectfully submitted that Chapter 6:7 does not sweep too broadly. The governmental interests recognized by this Court in *Pickering, supra,* and *CSC* v. *Letter Carriers, supra,* must take precedence over Respondent, Gasparinetti's, freedom of speech.

Surely one cannot seriously argue that the reference to superior officers as "cowards" in the midst of a highly charged controversy had no affect on morale and discipline within a para-military organization such as the Newark Police Department. If Chapter 6:7 is struck down how is discipline to be enforced within the Department? Aren't public comments of this kind completely detrimental to the employment relationship? *Sprague* v. *Fitzpatrick, supra* at p. 565.

The District Court and Judge Rosenn placed great emphasis upon *Magri* v. *Giarrusso,* 379 F. Supp. 353 (E. D. La. 1974). There *Magri,* the head of the local police union, made *public comments* critical of department practices and policies. That court sustained a regulation very similar to Chapter 6:7 as not being overbroad.

In the same manner Chapter 6:7 must withstand any charge that it is "vague". A statute or regulation is unconstitutionally vague if "it either forbids or requires the doing of an act in terms so vague that men of common

intelligence must necessarily guess as to its meaning and differ as to its application." *Connally* v. *General Construction Co.*, 269 U. S. 385, 391, 46 S. Ct. 126, 127, 70 L. Ed. 322, 328 (1926).

Surely Chapter 6:7 is set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest. *CSC* v. *Letter Carriers*, 413 U. S. at p. 579. See, *Arnett* v. *Kennedy*, 416 U. S. 134 (1974) and *Meehan* v. *Macy, supra*, where the use of general phrases such as "conduct unbecoming" is sanctioned and it is recognized that a public employee cannot reasonably take the position that he can both keep his job and defame his superiors in public. See also, *Magri* v. *Giarrusso, supra*, at p. 359.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 76-1605/6

RONALD GASPARINETTI and POLICEMEN'S BENEVOLENT ASSOCIATION, LOCAL No. 3,

Appellants in No. 76-1605

v.

EDWARD KERR, Police Director, City of Newark (on leave) and ANTHONY BARRES, Acting Police Director, City of Newark

Edward Kerr, Police Director, City of Newark (on leave) and Anthony Barres, Acting Police Director, City of Newark and the City of Newark,

Appellants in No. 76-1606

(D.C. Civil No. 74-595)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

[1a]

Appendix A

Argued September 6, 1977

Before: ALDISERT, ROSENN and GARTH, *Circuit Judges.*

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OPINION OF THE COURT

(Filed November 3, 1977)

GARTH, *Circuit Judge*

Appendix A

I.

On this appeal[1] (and cross-appeal[2]), we are presented with a challenge to five different regulations of the Newark, New Jersey, Police Department. The district court determined that two of the regulations[3] were unconstitutional, and enjoined their enforcement. The remaining three regulations[4] were held to be constitutional.[5] Plaintiffs had attacked the regulations as facially overbroad

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[1] No. 76-1605.

[2] No. 76-1606.

[3] Newark Police Department Rules and Regulations, ch. 3:1.2-5 and ch. 3:1.2-8.

[4] *Id.*, chs. 6:7, 6:8 and 5:4.1.

[5] There is some procedural ambiguity in this case. The order appealed from is entitled a "*Final* Order Denying and Granting In Part Motion for *Preliminary* Injunction." (Emphasis added.) Appendix at 38a. In it, the district court granted declaratory judgments and permanent injunctions prohibiting the enforcement of chs. 3:1.2-5 & 3:1.2-8. But it denied a motion to enjoin "*pendente lite*" chs. 5:4.1, and 6:8. Moreover, in its Opinion, Appendix at 58a-60a, the court discussed the standard relevant to preliminary injunctions. However, in footnote 2 of its Opinion, the district court stated that "counsel . . . have recognized that there is no factual dispute on the issue of facial constitutionality . . . [and that] the court will treat the matter as if cross-motions for summary judgment have been made on this issue." (Appendix at 41A). In light of footnote 2, and the absence of further proofs for submission to the district court (as counsel conceded in argument before this Court) if we remanded, we review the denial of the injunction *pendente lite* as a denial of a permanent injunction.

(Footnote continued on following page)

and vague, and as violative of their first amendment rights (made applicable to the states by the fourteenth amendment), as applied to them. Because we do not entirely agree with the district court's disposition, we affirm in part and reverse in part.

II.

This dispute arose out of a low income housing (Kawaida Towers) controversy[6] in Newark. The Tactical Force of the Patrol Division of the Newark Police Department, commanded by Inspector Thomas Critchley, was assigned to keep order at the building site. After the Kawaida dispute had largely run its course, Deputy Chief Thomas Henry, head of the Patrol Division, transferred six members of the Tactical Force to a less prestigious unit.

(Footnote continued from preceding page)

The district court limited its analysis of the regulations to the question of facial invalidity, and did not pass on the question of constitutionality of the regulations "as applied" to the plaintiffs. Given our disposition of the case, there is no need for us to reach this issue either.

Plaintiffs had initially also sought compensatory and punitive damages, but consented to their dismissal by the district court. Hence, this issue is not before us.

[6] A low income housing project, the Kawaida Tower Housing Complex, was proposed for construction in Newark's predominantly white North Ward. The proposed construction engendered strong, at times violent, community opposition. Emotions ran high on both sides, and there were several clashes between proponents and opponents. There was also picketing around the building site. The role of the Newark Police in the affair was criticized by both sides.

Plaintiff Ronald Gasparinetti is a police officer with the Newark Police Department. At the time of the incident described above, he was President of the Policemen's Benevolent Association (PBA),[7] the collective bargaining agent for the rank and file police officers. After Deputy Chief Henry transferred the six officers, Gasparinetti made several statements in the local press (Appendix at 1A, 3A), in the PBA Newsletter (Appendix at 3A), and in a PBA Union Notice (Appendix at 2A). It is these statements on which this case centers.

Gasparinetti[8] is charged that the six officers had been transferred because of pressure on Inspector Critchley by one Leroi Jones (Imamu Amiri Baraka), a black activist leader of the pro-Kwaida forces. Gasparinetti criticized Critchley for succumbing to political pressure and threats, and for operating outside the Department rules and regulations. He stated that Critchley and Henry were out to "break the morale and spirit of the men", and had practiced "deceit and lies" in order to circumvent the collective bargaining agreement. He further asserted that there were "cowards in the superior officers ranks", and that the men hesitated to face criminals when led by leaders like Critchley.

Subsequent to these statements, Inspector George Graf ordered Gasparinetti to make an "Administrative Submission" and an "Administrative Report," in which he

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[7] The PBA is the other plaintiff in this case. It was held to have standing by the district court, and that holding has not been challenged on this appeal.

[8] Gasparinetti himself was not a member of the Tactical Force; did not report to any of the officers in charge of the Kawaida operation, the Tactical Force, or the Patrol Division; and was not involved, as a police officer, in the Kawaida controversy.

was to answer seven questions regarding the "Critchley incident." In response, Gasparinetti sent Graf two letters in which he claimed that he understood the "order" to be merely a request for cooperation, and that in any event his actions were taken in his capacity as union leader, and therefore not subject to investigation by the Department. Approximately five months later, on September 13, 1973, Gasparinetti was formally charged with violations of departmental regulations ch. 3:1.2-5 (Derogatory Reference),[9] ch. 3:1.2-8 (Censuring Official Transactions),[10] ch. 6:7 (Public Disparagement),[11] ch. 5:4.1 (Obedience to Orders),[12] and ch. 6:8 (Acts of Insubordination).[13]

---

[9] One count; his statement that the six officers were transferred after pressure on Critchley by Leroi Jones.

[10] Three counts: (1) his statement that the six officers were transferred after pressure by Leroi Jones; (2) his statement that Critchley was assigned to head the Tactical Force in order to break the spirit and morale of the men; and (3) his statement that Critchley and Henry used deceit and lies to circumvent the union contract.

[11] Five counts: (1) and (2) were the same as counts 1 and 2 under ch. 3:1.2-8 (note 10 *supra*); (3) his statement that Critchley succumbed to political pressure and operated outside the Department's rules and regulations; (4) his statement that the men hesitate to face criminals when led by superiors like Critchley; and (5) his statement that there were cowards in the superior officers' ranks.

[12] Two counts: (1) Gasparinetti failed to submit the requested "Administrative Submission"; and (2) failed to submit an "Administrative Report."

[13] Two counts: These are the same as the counts under ch. 5:4.1 (*see* note 12 *supra*).

Gasparinetti then filed a complaint, subsequently amended to include the PBA as a plaintiff, against the Newark Police Director, asserting claims under 42 U.S.C. §§ 1983 and 1985, and sought damages and declaratory and injunctive relief. Subsequently he moved for a preliminary injunction. The district court entered its order and opinion on March 2, 1976. The court enjoined the enforcement of chs. 3:1.2-5 and 3:1.2-8, but refused to enjoin the enforcement of chs. 5:4.1, 6:7, and 6:8. (*See* note 5, *supra.*) It stayed pending appeal the enforcement of the latter three sections. This appeal and cross-appeal followed.

III.

Chapters 3:1.2-5 and 3:1.2-8

The district court held that the regulations ch. 3:1.2-5 (Derogatory Reference) and ch. 3:1.2-8 (Censuring Official Transactions) were facially overbroad, resulted in a chilling of first amendment rights, and therefore were invalid under the fourteenth amendment. These regulations provide:

> Chapter 3:1.2-5 Derogatory Reference—
>
> Police Officers and civilian employees shall not by manner, guesture, or speech criticize or make derogatory reference to Department orders or instructions either to the public or to the members of the Department.
>
> Chapter 3:1.2-8 Censuring Official Transaction—
>
> Unless in accord with official duties, police officers and civilian employees shall not, either in writing

or discussion, censure other Department members concerning official transactions within the Department.

For substantially the same reasons as are expressed in the district court's opinion (Appendix at 38A), we agree with the district court that these two regulations are unconstitutional, and their enforcement must be permanently enjoined.

IV.

Chapter 6:7

The district court also held that regulation ch. 6:7 (Public Disparagement) was not unconstitutionally overbroad and vague.[14] That section reads:

> Chapter 6:7 Public Disparagement—
>
> Department members shall not publicly disparage or comment unfavorably or disrespectfully on the official action of a superior officer, nor on the Rules, Regulations, Procedures or Orders of the Police Department.

The district court was of the opinion that ch. 6:7 did not sweep "too broadly in effectuating the legitimate scope of governmental activity," *viz.* the maintenance of public confidence in the police department, since the regulations were directed only at a policeman's *public* speech. *See* District Court Opinion at 15, Appendix at 54A. We disagree.

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[14] Since we dispose of this issue on overbreadth grounds, we do not find it necessary to reach the question of vagueness.

A.

"A clear and precise enactment may nevertheless be 'overbroad' if in its reach it prohibits constitutionally protected conduct." *Granyed* v. *City of Rockford,* 408 U.S. 104, 114 (1972). "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *NAACP* v. *Button,* 371 U.S. 415, 432-33 (1963). Since there is a great danger that the exercise of first amendment rights will be chilled by penalties on speech, *see Keyeshian* v. *Board of Regents,* 385 U.S. 589, 603 (1967), the regulation must be "in terms susceptible of objective measurement." *Cramp* v. *Board of Public Instruction,* 368 U.S. 278, 286 (1961). When faced with an overbreadth challenge a court must decide, first, if there is a legitimate and substantial state interest in regulating a class of speech, and, if so, "whether that interest is being pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960). *See Grayned* v. *City of Rockford, supra* at 119; *see also Keyeshian* v. *Board of Regents, supra* at 601. The enactment regulating speech, therefore, may not be an impermissibly broad prophylactic; nor can it unnecessarily interfere with first amendment rights. *See Grayned* v. *City of Rockford, supra* at 119. The crucial question, then, is whether the regulation sweeps within its prohibitions that which is protected under the first and fourteenth amendments. *See id.* at 115.

The regulation at issue in this case is directed at comments by police officers. In *Pickering* v. *Board of Educa-*

tion, 391 U.S. 563 (1968), the Supreme Court recognized that the State has a greater interest in regulating the speech of public employees than in regulating the speech of citizens in general.[15] *Id.* at 568. In certain situations, a public employee may be discharged on the basis of speech, "without offending the guarantees of the First Amendment." *Arnett* v. *Kennedy*, 416 U.S. 134, 160 (1974). *See Sprague* v. *Fitzpatrick*, 546 F.2d 560 (3d Cir. 1976). The area of unregulable speech available to public employees is accordingly narrower than that available to the public at large. In our determination of the overbreadth *vel non* of ch. 6:7, therefore, we must consider that the first amendment protections afforded to police officers, at least as those protections apply to regulations directed to speech made in their capacity as police officers

[15] In Pickering v. Board of Education, 391 U.S. 563 (1968), a school teacher, in a letter to a local newspaper, attacked the school board's handling of bond issue proposals, and its allocation of financial resources between the schools' educational and athletic programs. After the letter was published he was dismissed by the Board. The Supreme Court held that Pickering's first amendment rights had been abridged. In so doing, the Court noted that the matters about which Pickering had written were matters of public interest, and further, that his comments had not involved his immediate superiors so as to undermine "the effectiveness of the working relationship between them." *Id.* at 570. The Court reiterated the principle that "statements by public officials on matters of public concern must be accorded First Amendment protection despite the fact that the statements are directed at their nominal superiors." *Id.* at 574. Here, we note that Gasparinetti's comments concerned matters of public interest, and that the statements which formed the basis of the charges against him did not concern his immediate superiors or any other Department member with whom he came into contact in his capacity as a police officer. Of equal significance, Gasparinetti was not personally involved in any way with the Kawaida incidents.

(not to mention their capacity as PBA officials), are somewhat more circumscribed than those afforded to members of the public.[16] It is necessary that regulation be narrowly tailored to effectuate the Department's legitimate interests, while not unduly encroaching upon the first amendment rights of those it regulates.

In this case we can recognize a significant government interest in regulating some speech of police officers in order to promote efficiency, foster loyalty and obedience to superior officers, maintain morale, and instill public confidence in the law enforcement institution. To achieve these ends, regulations may be promulgated, but their restrictive effect may extend only as far as is necessary to accomplish a legitimate governmental interest. As the Supreme Court said in a related context, "policemen, like teachers and lawyers, are not relegated to a watered down version of constitutional rights." *Garrity* v. *New Jersey*, 385 U.S. 493, 500 (1967).[16a]

[16] In Muller v. Conlisk, 429 F.2d 901, 904 (7th Cir. 1970), which held overbroad a similar police department regulation, the court stated:

> To the extent that being a policeman is public employment with unique characteristics, the right of the employee to speak on matters concerning his employment with the full freedom of any citizen may be more or less limited. It is not, however, destroyed. *Pickering, supra*, 391 U.S. at 568, 88 S. Ct. 1731; *Garrity, supra*, 385 U.S. at 500, 87 S. Ct. 616.
>
> Thus, it is clear that the First Amendment would reach and protect some speech by policemen which could be considered "derogatory to the department."

[16a] Judge Rosenn, writing in dissent, apparently does not disagree with our expression of the standard against which the challenged regulation must be measured. Dissenting Op. at 17-19.

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B.

The disputed "Public Disparagement" (ch. 6:7) regulation provides that a Department member shall not "publicly disparage or comment unfavorably or disrespectfully" on the official actions of superior officers or on the orders of the Department. It is the regulation's prohibition against unfavorable comment which we find to be the most troublesome, as it appears to sweep within its ambit, speech which is clearly protected under the first amendment.

For example, does criticism of the Department's work rules, voiced by a police officer at a public PBA meeting, constitute "unfavorable comment" which could lead to the imposition of sanctions? Has a policeman "comment[ed] unfavorably" when he, in a public setting, claims that a new departmental policy, which requires that patrol cars be manned by but one officer, is not in the public interest? Or is a member of the Department, who is also a PBA representative engaged in contract negotiations with the City, guilty of "unfavorable comment" within the meaning of ch. 6:7 if he charges that the Police Director is not negotiating in good faith? It seems to us that in all these situations ch. 6:7 would be violated, and that consequently *any* publicly voiced disagreement with Department policy would violate ch. 6:7. Yet the first amendment surely protects such expressions of opinion about matters of public concern. *See Pickering* v. *Board of Education, supra.*

Counsel for the City argued before us that the examples of protected speech cited in the preceding paragraphs would *not* be violations of ch. 6:7. This, however, is not clear to us. Certainly the regulation, on its face, by proscribing unfavorable comment without qualification,

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would appear to prohibit such statements. Moreover, unlike cases such as *Arnett* v. *Kennedy, supra; Levy* v. *Parker,* 417 U.S. 733 (1974); and *C.S.C.* v. *Letter Carriers,* 413 U.S. 548 (1973), all of which upheld broadly phrased regulations restricting the speech and conduct of public employees, in the case *sub judice* there is no interpretive guidance (such as administrative or historic interpretations, and prior decisions) to delimit the scope of the regulation.

The City's counsel contended that a "reasonable man" standard must be read into the regulation, and that a police officer, in the exercise of common sense, would know what speech is protected and what speech violates the rule. While we do not hold that an implicit "reasonable man" interpretation can never save an otherwise overbroad enactment, it seems to us that in this case the term "comment unfavorably" is not a "term susceptible of objective measurement", *Cramp* v. *Board of Public Instruction, supra,* at 286, and cannot be legitimated by construing it in accordance with such a standard. For example, the City's attorney, at oral argument, responded to the Court's questioning on this point by asserting that, in his opinion, if a policeman stated at a public meeting that a particular Department policy was "unwise", he would *not* violate ch. 6:7. If, however, the officer stated that the policy was "stupid", he would have "comment[ed] unfavorably" within the purview of the rule. We do not think that a police officer should be required to make such a subtle distinction when it involves his first amendment rights. It is precisely this kind of broad, overinclusive restriction on speech which deprives first amendment freedoms of the breathing space those liberties need to survive, *NAACP* v. *Button, supra,* at 432-33, since

the person regulated can never be certain that he will not be penalized for speech which is indeed protected.[16b] The avoidance of this chilling effect is at the heart of the overbreadth doctrine, *see Keyeshian* v. *Board of Regents, supra,* at 603.

C.

We recognize that the Newark Police Department has important interests in regulating some speech of its members. Ch. 6:7, however, indiscriminately casts its net so as to catch, along with that speech which the Department

[16b] Judge Rosenn in dissent admits that the examples which we have cited in the text as probable violations of ch. 6:7 "might well be within the literal language [of the regulation] 'comment unfavorably,'" but only if that phrase is taken out of context. Dissenting Op. at 21. However, claims the dissent, the "overall effect of the rule would not be so inclusive" when it is read in the light of a reasonable man standard, and when the term "comment unfavorably" is read to imply disparaging or disrespectful comment. Id. at 21-22.

The difficulty with this argument is twofold. First, the dissent's interpretation renders the term "comment unfavorably" as mere surplusage, for it equates that term with the two other operative terms of the regulation, giving it no independent content. Second, the dissent would require a police officer to assess the "overall effect" of the regulation rather than to determine if his speech violates the plain language of the regulation. We are not as confident as Judge Rosenn that a police officer could discern the "overall effect" of ch. 6:7, even under a reasonable man standard, so as to know whether or not his intended speech would violate the rule. The dissent would demand that the police officer make a judgment so subtle that to date four different judges passing on the same issue cannot agree as to the proscriptive effect of the resignation. (In contrast with our holding here, the district court judge held, and Judge Rosenn would hold, that the term "comment unfavorably" is susceptible of objective measurement.)

may properly regulate, much speech in which the Department's legitimate interest is minimal. Given the substantial encroachment on the first amendment-protected areas of police officers' speech, the lack of interpretive guidance in construing the regulation, the failure to differentiate between criticism of immediate superiors, which might result in disruption, and criticism of remote superiors, where disruption is unlikely,[17] and the public's strong interest in open debate and access to information about its police,[18] we hold that ch. 6:7 is overboard and therefore invalid on its face.[18a]

[17] *See* Pickering v. Board of Education, 391 U.S. 563 (1968); Sprague v. Fitzpatrick, 546 F.2d 560 (3d Cir. 1976). *See also* note 15 *supra.*

[18] *See* Pickering v. Board of Education, *supra,* at 573. The public interest in free and open debate about its police department's operations is vital. It is important that the public have access to the thoughts and expressions of the rank and file police officer, whose views as to the effectiveness of police policy may be quite valuable to the community. Moreover, there is an especially strong public interest in having a police union leadership who will speak openly and candidly about their members' grievances and demands. Insofar as ch. 6:7's prohibitions could preclude statements by PBA leaders, the public's ability to obtain such information is curtailed.

[18a] The dissent reaches the opposite result, in large part because of its conclusion that policemen's rights are outweighed by the "powerful need within a police department for unity and obedience . . . [and] for public confidence." Dissenting Op. at 23. We agree that these are legitimate needs. But the same restrictions on a policeman's speech which may further these needs can well be the means by which legitimate criticism is stifled, dissent within the department repressed, and abuses of power concealed. It is in part for this reason that we hold that such legitimate departmental needs must be achieved through properly drawn regulations affecting speech which are not overbroad

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D.

Other courts, when faced with overbreadth challenges to similarly broad police department regulations, have reached the same result.[19] In *Muller* v. *Conlisk,* 429 F.2d 901 (7th Cir. 1970), the court held overbroad a police department regulation which prohibited "'[e]ngaging in any activity, conversation, deliberation, or discussion which is derogatory to the Department or any member or policy of the Department'". *Id.* at 902. The court concluded that the regulation in effect proscribed *all* criticism by policemen of the department, *id.* at 904, and therefore was invalid. *Cf. Bence* v. *Breier,* 501 F.2d 1185 (7th Cir. 1974) (holding a police department rule which proscribed "conduct unbecoming" a police officer unconstitutionally vague).

In *Flynn* v. *Giarrusso,* 321 F. Supp. 1295 (E.D. La. 1971), the court invalidated as overbroad a police depart-

[19] We do not view Kannisto v. City and County of San Francisco, 541 F.2d 841 (9th Cir. 1976), *cert. denied,* 45 U.S.L.W. 3634 (U.S. March 21, 1977), as contrary to our conclusion. In *Kannisto,* the court refused to hold that a police department regulation, which proscribed "misconduct or any conduct . . . which tends to subvert the good order, efficiency or discipline of this Department or which reflects discredit upon the Department . . . or that is prejudicial to . . . efficiency and discipline . . .", was invalid. First, we question whether the *Kannisto* court ever really passed on the overbreadth challenge. Second, the regulation in *Kannisto* is distinguishable from those in *Muller, Flynn* and this case, in that it proscribes *conduct,* and is not a direct prohibition on speech (*see Broadrick* v. *Oklahoma,* 413 U.S. 601, 615 (1973)). Moreover, it is restricted to and couched in terms of conduct affecting efficiency and discipline, concerns in which the police department has a strong and clearly legitimate interest.

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ment regulation which provided that a "member shall not unjustly criticize or ridicule, or express hatred or contempt toward, or indulge in remarks which may be detrimental to . . . any person." The court in *Flynn* "fail[ed] to see what possible legitimate interest the . . . Police Department can have to warrant such a sweeping prohibition on the speech of its members." 321 F. Supp. at 1299. Also, *see Havrilak* v. *Kelley,* 425 F. Supp. 626 (D. Conn. 1977).

Ch. 6:7 of the Newark Police Department Rules and Regulations is open to the same objections as the regulations in *Muller* and *Flynn.*[20] As noted earlier, it essentially prohibits all criticism by police officers of the actions and policies of the Newark Police Department. Moreover, the Department has no legitimate interest in so broadly regulating its members' speech. Just as the regulations in *Muller* and *Flynn* could not pass constitutional muster for

[20] The dissent refers to Magri v. Giarusso, 379 F. Supp. 353 (E.D. La. 1974), as a holding contrary to our conclusion. Dissenting Op. at 25. We disagree, as we believe that *Magri* is distinguishable. The regulation in that case (set forth in relevant part in the Dissenting Op. at 9) forbid public criticism and ridicule, which in our view is far narrower in its restrictive scope than ch. 6:7's proscription against unfavorable comment. Moreover, the *Magri* regulation by its terms only prohibited that criticism or ridicule which "tend[ed] to impair the operation of the department by interfering with efficiency; interfering with the ability of supervision to maintain discipline; or having been made with reckless disregard for truth or falsity." 379 F. Supp. at 357. As such, that regulation is tailored precisely to the interests which the department legitimately may seek to protect. There are no such limitations on ch. 6:7's bar against unfavorable comment.

those reasons,[21] so ch. 6:7 cannot be sustained here. *See NAACP* v. *Button,* 371 U.S. 415, 433 (1963): "The objectionable quality of . . . overbreadth . . . [is] the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application." *See also Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960).[22]

V.

CHS. 5:4.1 AND 6:8—

The district court also refused to enjoin the enforcement of chs. 5:4.1 and 6:8 against Gasparinetti. Those regulations provide:

> Chapter 5:4.1 OBEDIENCE TO ORDERS—
>
> Police officers or civilian employees shall promptly and fully obey any lawful order directed to them by a superior officer.

[21] In support of its conclusion that ch. 6:7 is not overbroad because it only prohibits *public* (as distinct from private) speech, the dissent cites *Muller, Flynn, Magri* and *Havrilak* (Dissenting Op. pp. 24-25). These cases do not sustain the argument advanced by the dissent. While these cases recognize, as do we, that the private or public nature of the proscribed speech has a bearing on overbreadth determinations, none of those cases hold that any proscription on a police officer's public speech, no matter how overbroad, is constitutional.

[22] Because we have found ch. 6:7 to be facially overbroad, at least to the extent that it includes a proscription against unfavorable comment, we have not found it necessary to reach the question of whether the regulation, if held to be constitutional on its face, would nevertheless be unconstitutional as applied to Gasparinetti.

> Chapter 6:8 ACTS OF INSUBORDINATION—
>
> Department members shall not commit acts of insubordination or disrespect to any superior officer. (As defined in Chapter 2:1.10 of the Rules and Regulations).[23]

The charges brought against Gasparinetti under ch. 5:4.1 read as follows:

> CHARGE IV:
>
> Violation of Newark Police Department Rules and Regulations, Chapter 5:4.1—OBEDIENCE TO ORDERS—Police Officers or civilian employees shall promptly and fully obey any lawful order directed to them by a superior officer.
>
> (TWO COUNTS)
>
> SPECIFICATIONS:
>
> 1. On April 12, 1973, in the office of the Internal Affairs Division and in the presence of Lieutenant Robert Gauthier, Police Officer Ronald Gasparinetti did receive a lawful verbal order from Inspector George Graf, a superior officer, directing him to submit an "Administrative Submission" DPI:1001, through channels with his answers to the seven (7) questions asked of him by Inspector Graf, and he did wilfully disobey this order when he failed to comply as directed.

[23] No question has been raised on this appeal with respect to the definitional provisions of ch. 2:1.10.

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> 2. On April 23, 1973 in the office of the Internal Affairs Division, and in the presence of Lieutenant William Lissenden, Police Officer Ronald Gasparinetti, did receive a direct lawful verbal order from Inspector George Graf, a superior officer to submit an "Administrative Report," not a letter, through channels, with his answers to the seven (7) questions asked of him by Inspector Graf on April 12, 1973, and he did wilfully disobey this order when he failed to comply as directed.

(Appendix at 6A-7A). The charges filed against Gasparinetti under ch. 6:8 are virtually identical to those filed under ch. 5:4.1. (Appendix at 7A-7B).

Gasparinetti argues that "[o]nce it is recognized that the Newark Police Department Rules and Regulations sanctionnig police officers' speech are unconstitutional . . . it is clear that the disciplinary charges for alleged violations of the remaining Rules (5:4.1 'Obedience to Orders' and 6:8 'Acts of Insubordination') . . . cannot be sustained. The Police Department had no right to inquire into Gasparinetti's constitutionally protected speech and associational interests. . . . Gasparinetti rightly refused to answer questions relating to such protected areas. . . ." Appellant's Brief at 23. He asserts that the validity of any order must be measured by the validity of the regulation pursuant to which the order is made, and he concludes that, if he cannot be sanctioned for the public statements that he made, then he cannot be sanctioned for failure to supply Administrative Reports or Submissions which relate to those statements.

The Police Department charged Gasparinetti with violating chs. 5:4.1 and 6:8 because he refused to make a

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formal answer to seven questions put to him by Inspector Graf. Instead he submitted two letters, dated April 16, 1973, and April 23, 1973, in which he claimed that the questions concerned matters of PBA interest and were therefore not subject to Department exploration. (Appendix at 31, 32A).

The district court refused to grant injunctive relief to Gasparinetti with respect to the enforcement of chs. 5:4.1 and 6:8. Its decision, however, was premised on its holding and belief that ch. 6:7 was constitutional. We, on the other hand, have held that ch. 6:7 is overbroad and cannot be constitutionally sustained. Moreover, the seven questions which the Department ordered Gasparinetti to answer do not appear in the record. Hence, we are not in a position to determine whether, in light of the unconstitutionality of ch. 6:7 and the substance of the seven questions, Gasparinetti may be sanctioned for his refusal to answer. That determination should be made by the district court in the first instance.

VI.

Having concluded that the district court did not err in holding chs. 3:1.2-5 and 3:1.2-8 unconstitutional, we will affirm so much of the district court's Order of March 2, 1976, as permanently enjoins their enforcement.

However, contrary to the district court, we have also concluded that ch. 6:7 is overbroad and therefore unconstitutional. Accordingly, so much of the district court's Order of March 2, 1976, as denies plaintiffs an injunction as to the enforcement of ch. 6:7 will be reversed, with the direction that an injunction issue against the enforcement of ch. 6:7.

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Inasmuch as we are unable to assess the effect of our holding on the district court's disposition of chs. 5:4.1 and 6:8, we will reverse so much of the district court's Order of March 2, 1976, as pertains to those two chapters, and remand to the district court for further proceedings consistent with this opinion.

ROSENN, Circuit Judge, concurring in part and dissenting in part

I dissent because I believe the judgment and orders of the district court should have been affirmed in toto. The majority affirm the district court in holding that chapters 3:1.2-5 ("DEROGATORY REFERENCE") and 3:1.2-8 ("CENSURING OFFICIAL TRANSACTIONS") are unconstitutionally overbroad on their face, resulting in a chilling of first amendment rights. I agree as to this aspect of the majority's opinion for the reasons stated by them and those expressed by the district court. I disagree with the majority's reversal of the district court's holding that chapter 6:7 ("PUBLIC DISPARAGEMENT") is constitutional and the majority's consequent reversal of the district court's refusal to enjoin disciplinary procedeings against appellant, Ronald Gasparinetti ("Gasparinetti"), brought under chapter 5:4.1 ("OBEDIENCE TO ORDERS") and chapter 6:8 ("ACTS OF INSUBORDINATION").

The majority hold that chapter 6:7 is facially overbroad. I disagree both as to their construction of the rule and to the balance they strike between the individual and governmental interests. I would hold the rule facially valid. I would also reach the question of whether chapter 6:7 is either vague or unconstitutional as applied to Gasparinetti, concluding that neither test renders the rule invalid. Because I believe that chapter 6:7 is constitutional I would affirm the district court's refusal to grant an injunction preventing application of chapters 5:4.1 and 6:8 to Gasparinetti.

Appendix A

I. PUBLIC SPEECH OF POLICEMEN MAY BE LIMITED

The language of the first amendment is seemingly absolute, that no law shall be passed "abridging the freedom of speech." U.S. Const. Amend. I. The Supreme Court, however, has never interpreted this clause that strictly; a balance has been struck between the speech interests of individuals and the governmental need for law and order. *See Konigsberg* v. *State Bar,* 366 U.S. 36, 49 (1961); *Dennis* v. *United States,* 341 U.S. 494, 508 (1951).

When faced by a challenge to governmental regulation of speech of citizens in general, the Government must present compelling justification for its encroachments, *see Brandenberg* v. *Ohio,* 395 U.S. 444 (1969) (per curiam). The government, however, as employer may exercise some incidental speech control over its employees in furtherance of the goals of their employment. *Arnett* v. *Kennedy,* 416 U.S. 134 (1974); *Pickering* v. *Board of Education,* 391 U.S. 563 (1968).

> [T]he government has an interest in regulating the conduct and "the speech of its employees that differ[s] significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon mat-

> ters of public concern and the interest of the [government], as an employer, in promoting the efficiency of the public services it performs through its employees."

CSC v. *National Ass'n of Letter Carriers,* 413 U.S. 548, 564 (1973), *quoting, Pickering* v. *Board of Education, supra,* 391 U.S. at 568.

On this basis public employees may be disciplined for their speech without offending rights secured by the first amendment. *See Sprague* v. *Fitzpatrick,* 546 F.2d 560, 565 (3d Cir.), *affirming,* 412 F. Supp. 910, 919 (E.D. Pa. 1976) (Even though employee is punished for speech, interest of government in stable and effective relations between workers is enough to permit the action).

The need of the government to exercise incidental speech regulation over its employees in furtherance of the goals of their employment is especially justified and necessary with the police. Regardless of the historical origin of the municipal police force, whether as a need to supplement the citizens role in keeping the peace or an interest in creating a civilian military, municipal police forces are a para-military force by virtue of their organized structure, central control, discliplined rank and file, and uniform dress and appearance, all designed to carry out the efficient conduct of their duties.

The police generally resemble the military—a closed isolated sector with its own customs and needs, *see* Bernard, *Structures of American Military Justice,* 125 U. Pa. L. Rev. 307, 312-33 (1976)—rather than other employees in the public sector. This structure need not necessarily be imposed, but as the Supreme Court indicates in *Kelley*

v. *Johnson,* 425 U.S. 238 (1976), the choice of the local government to organize along para-military lines must be respected by the courts in cases in which the content of police regulations is challenged rather than the structure of the force itself. 425 U.S. at 246.

"For the reasons which differentiate military society from civilian society, we think Congress is permitted to legislate both with greater breadth and greater flexibility when prescribing the rules by which the former shall be governed than when prescribing rules for the latter." *Parker* v. *Levy,* 417 U.S. 733, 756 (1974). Similarly, states must be given considerable leeway in legislation regulating the local equivalent of the military, the police. In today's highly complex and mobile society, in which crime is assisted by enormous advances in technology, transportation, and instant communication, the policeman is more than ever a trained officer entrusted with responsible and serious assignments as a public servant.

> His work habits on active duty require disciplined conduct, regimentation and frequent strict adherence to regulation and authorized detail. . . . It is essential that a policeman's training be such that he be taught to obey strict discipline, procedure and rules in order to lend practical assurance that he will follow command and not abuse his awesome authority.

Stradley v. *Anderson,* 478 F.2d 188, 190 (8th Cir. 1973). The state, therefore, has a significant governmental interest, succinctly expressed by the majority, "in regulating some speech of police officers in order to promote efficiency, foster loyalty and obedience to superior officers, maintain morale, and instill public confidence in the law enforcement institution." Majority Opinion at 9.

While it is true that policemen are not relegated to an emasculated version of constitutional rights, *Garrity* v. *New Jersey,* 385 U.S. 493, 500 (1967), it is equally clear that in certain contexts involving the need for police discipline and *espirit de corps,* the government is entitled to regulate police activity to a much greater extent than "civilians." *See, e.g., Kelley* v. *Johnson, supra,* (assuming first amendment right in personal appearance, Court holds that state need only show rational need for regulation, unlike compelling need for civilians). Accepting the principle that a police officer is entitled to first amendment protection, it may well be that he is entitled to less than other public servants. *See Muller* v. *Conlisk,* 429 F.2d 901, 904 (7th Cir. 1970).

II. The "Public Disparagement" Rule Is Not Overbroad On Its Face

In assessing claims of overbreadth, this court must first determine the extent of the challenged rule and then balance the governmental need to regulate the speech against the individual's rights. Before considering that balance in this case, the scope of the challenged rule must be established.

The test for constitutionality of a state rule challenged on first amendment grounds is whether the interest of the state in limiting the speech outweighs the interest asserted by the individual. Preliminary to that balancing, however, the court must construe the language of the rule to determine what conduct is proscribed. The majority pose a number of hypotheticals here that they claim come within the ambit of the "public disparagement" rule, including:

(1) criticism of department work rules, voiced at a public PBA meeting; (2) claims that a new departmental policy is against the public interest, stated in a public setting; and (3) charges that a Police Director is not negotiating a contract in good faith—presumably made in a public setting, but not so posed by the majority. Majority Opinion at 9-10. Although each of these hypotheticals might well be within the literal language "comment unfavorably" when the phrase is taken out of context, fairly read, the overall effect of the rule would not be so inclusive.

The Supreme Court in *CSC* v. *National Ass'n of Letter Carriers, supra,* 413 U.S. at 571, reminds us that "our task is not to destroy [challenged regulations] if we can, but to construe [them] . . . so as to comport with constitutional limitations." Our duty then is to give narrow effect to rules of police conduct so as to limit their possible overbreadth. The majority has indicated that the language "publicly . . . comment unfavorably" is that which may be unconstitutionally applied. Their construction of that language flies in the face of the Court's admonition in *CSC* v. *National Ass'n of Letter Carriers* and is unnecessarily broad. The rule must be read, not only in light of a reasonable man standard as suggested by the Police Department, but more importantly within the context of the rule itself.[1]

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[1] The majority do not hold that an implicit reasonable man standard can never be employed to narrow the scope of a challenged rule. The majority maintain that the language of chapter 6:7, "comment unfavorably," is not susceptible of objective measurement. I think the majority would be correct if that was the sole term used within the rule. However, they ignore the title of the chapter, Public Dis-

(Footnote continued on following page)

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Chapter 6:7 is not focused primarily at the content of speech as it is on the *forum* for it. The rule is directed against the use of a public forum for speech coupled with departmental disparagement. The rule then is seen as akin to a time, place, and manner regulations, much like prohibitions against "fighting words." *See Chaplinsky* v. *New Hampshire,* 315 U.S. 568 (1942); *Cantwell* v. *Connecticut,* 310 U.S. 296 (1940). Chapter 6:7 is headed "PUBLIC DISPARAGEMENT." The rule prohibits members from *publicly disparaging* and *publicly commenting unfavorably* or *disrespectfully* on official action of police superiors or departmental rules or orders. Read in context, unfavorable is joined inextricably with disparaging and disrespectful. So read, the rule is intended to limit public unfavorable comment, but unfavorable must be read to imply public disrespect or disparagement. There is little difficulty in concluding that the rule is not aimed at mere unfavorable public comment; its overall purpose and tone indicate a need to show something greater. Therefore, the majority conclusion that "*any* publicly voiced disagreement" would violate chapter 6:7 is unwarranted.[2] Even were we to

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(Footnote continued from preceding page)

PARAGEMENT, as well as its other terms, disparage and disrespect. The example given at page 10 of the Majority Opinion of distinguishing between "unwise" and "stupid" is not so difficult to make, given the overall effect of the rule. I am inclined to hold that the reasonable man standard is applicable here but find it unnecessary, given my affirmation of the facial constitutionality of the challenged regulation.

[2] Although the majority do not hold that the parts of chapter 6:7 prohibiting public disparagement and disrespect are constitutional, they address themselves only to "comment unfavorably." Because as I read the rule, unfavorable comment is qualified by public disparagement and disrespect, the problems posed by the majority are readily resolved.

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accept the majority's construction of the rule, the relevant cases require that we sustain the regulation. The majority recognize that there is "a significant government interest in regulating some speech of police officers." Yet, even given this legitimate governmental interest the majority hold that the Department may not enforce chapter 6:7 for sufficient breathing space is not provided for enjoyment of first amendment rights. Majority Opinion at 10. Had this been a case involving teachers or other public employees, such a conclusion might have been plausible, but because the rule is aimed at police officers it seems to me that the balance required by *Pickering* would sustain the "public disparagement" rule.

The majority have drawn a bright line between chapter 6:7's prohibition against public disparagement and public disrespect and its prohibition against public unfavorable comment. It seems that the distinction is really trivial, for the three provisions read together attempt to serve an identical purpose, the deterrence of *public statements* which tend to destroy morale and unity within the ranks of the police force and public confidence in the police department. There is a powerful need within a police department for unity and obedience; there is an equally strong necessity for public confidence. It is of great importance that subordinates show proper respect to superior officers. Without some rules limiting public criticism, morale and public confidence in the police would likely be undermined.[3]

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[3] Gasparinetti's conduct here exemplifies the need to prohibit disparagaing public statements by police officers about their superiors and about official policy. In the wake of bitter racial turmoil in the city of Newark, Gasparinetti publicly made various derogatory statements about his superiors and about official policy:

(Footnote continued on following page)

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Chapter 6:7 does not prevent criticism absolutely. A reasonable latitude for criticism is permitted. Police officers are free to criticize among themselves or to level criticism at their superiors. Only criticism which publicly disparages police policy and superiors is restricted. Private channels of communication are left open. The majority ignore this freedom of the police to exercise an extensive range of speech, speech which may be highly critical, derogatory, or inflammatory. Any private communication is permissible; any public communication which

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(Footnote continued from preceding page)

1. "That six (6) police officers were transferred after alleged pressure brought on Police Inspector Thomas Critchley by LeRoi Jones (Imanu Amiri Baraka)," or words to that effect.

2. "Critchley was assigned to the Tactical Squad in order to break the morale and spirit of the men," or words to that effect.

3. "When a man such as Critchley succumbs to political pressure and threats of LeRoi Jones, then he is operating outside the Rules and Regulations," or words to that effect.

4. "The public wants to know why the police department doesn't do its job. Well, this is a very big part of the answer. We have the men that are willing to face the criminals but when they are led by superiors like Critchley they hesitate," or words to that effect.

5. In reference to picketing in front of Newark City Hall he said, "We picketed to let people know we have cowards in superior officer ranks," or words to that effect.

The overall effect of such public statements can only undermine public confidence and department efficiency. The complaints could easily have been made privately, within established lines for criticism within the department or by letters to superiors or elected officials who could remedy the situation. To prevent such incidents, rules such as chapter 6:7 are enacted.

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is not disparaging is also permissible. The fear of chilling the exercise of free speech expressed by the majority is overdrawn. Even the cases which the majority cite support my view that the line for constitutional purposes is not between commenting and disparaging but is between public and private speech.

Muller v. *Conlisk, supra,* involved a challenge to a regulation of the Chicago police department which "on its face prohibit[ed] all such speech [disparaging in nature], even private conversation . . . ." 429 F.2d at 904. It was for that reason that the rule was found overbroad. *Id.* Of like effect in *Haurilak* v. *Kelley,* 425 F. Supp. 626 (D. Conn. 1977), in which a police regulation which prohibited department employees under any circumstances from speaking critically or derogatorily "to other members or employees" as well as outsiders was challenged. *Id.* at 629. The regulation was found unconstitutional because it punished the officers for "discussing among themselves the merits of any order or instruction . . . ." *Id.* at 632.

Flynn v. *Giarruso,* 321 F. Supp. 1295 (E.D. La. 1971), cited by the majority, does not help in their quest to draw the line between public comment and public disparagement. It too involved a regulation prohibiting criticism directed to "any person," public or private. *Id.* at 1299. However, *Magri* v. *Giarruso,* 379 F. Supp. 353 (E.D. La. 1974), decided by the same district court found facial validity in the following regulation adopted by the police department after the *Flynn* case which is quite similar to the "public disparagement" rule under attack in the instant case:

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CRITICISM

> Members and employees shall not *publicly criticize* or ridicule the department, its policies or other employees by talking, writing or expressing any other manner, where such talking, writing or other expression:
>
> * * *
>
> d. tends to impair the operation of the department by interfering with its efficiency; interfering with the ability of supervisors to maintain discipline; or having been made with reckless disregard for truth or falsity.

379 F. Supp. at 357 (emphasis supplied).

The court concluded that the problems expressed with the similar rule declared unconstitutional in *Flynn* had been cured. *Id.* at 358 ("Article 33 does not distinguish between public and private speech . . . ."). Any distinction between publicly unfavorable comment and "publicly criticize" eludes me. I agree with the *Magri* court that in this context it is the prohibition of private speech which is constitutionally prohibited, not incidental effects on public speech.[4] I see no substance to the distinction which the majority draws between "publicly criticize and

[4] The same distinction was drawn by the district court in the instant case. It held that chapters 3:1.2-5 (derogatory reference) and 3:1.2-8 (censuring official transactions) were overbroad on their face and that chapter 6:7 was facially valid. The only real distinction between the sections is that chapter 6:7 is directed only at public speech whereas the other chapters are directed at all communication. The majority really do not address this distinction adequately and instead concentrate on fine distinctions of language which need not be made.

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ridicule" in the *Magri* regulation and the "public disparagement" regulation in this case. (Majority Opinion p. 13 n.20).

The "public disparagement" rule does not sweep too broadly in effectuating the governmental interest in the morale and unity of the police force. It does not prevent dissent or criticism. Intra-departmental lines for redress of problems are available. Public criticism of non-police officials and events is not prohibited. The regulation only limits disrespect, disparagement, and unfavorable criticism voiced in a public forum. The fine line the majority attempts to draw in a police organization between unfavorable public comment and disparagement is unsound and untenable.[5] The clear line for constitutional challenges, as shown by *Muller* v. *Conlisk, supra; Haurilak* v. *Kelley, supra; Magri* v. *Giarruso, supra;* and *Flynn* v. *Giarruso, supra,* is that drawn between public speech and private speech. Unless the rule is so broad as to prohibit all criticism or a very large portion which would include private communication, rules regulating public speech by police officers are facially valid.

[5] Even accepting such a reading, prohibition of the conduct here could survive constitutional challenge. The Supreme Court has expressed hesitancy to find overbroad rules which are substantially valid. *See* CSC v. National Ass'n of Letter Carriers, *supra,* 413 U.S. at 581. Thus, even if there are marginal applications of the regulations which would infringe on the first amendment, facial invalidation is inappropriate if there is a whole range of constitutionally prohibitable conduct. Parker v. Levy, *supra,* 417 U.S. at 760; CSC v. National Ass'n of Letter Carriers, *supra,* 413 U.S. at 580-81. Even the majority would agree that the rule here could be applied constitutionally to many police activities.

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III. Chapter 6:7 Is not Vague Nor Unconstitutional As Applied To Gasparinetti

Appellants have challenged chapter 6:7 as unconstitutionally vague and as unconstitutionally applied to Gasparinetti. Judge Lacey held that chapter 6:7 was neither vague nor unconstitutionally applied. I agree.

The language of 6:7, though not totally clear, is "set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with without sacrifice to the public interest." *CSC* v. *National Ass'n of Lester Carriers, supra,* 413 U.S. at 579. Vagueness may be found when a regulation is so vague that men of ordinary intelligence must guess as to its meaning and differ as to its application. *Connolly* v. *General Construction Co.,* 269 U.S. 385, 391 (1926). I agree with Judge Lacey that chapter 6:7 is reasonably specific. It is written in terms which are understandable and which provide notice as to what conduct is prohibited; it is not vague. *See Arnett* v. *Kennedy, supra,* 416 U.S. at 161.

Gasparinetti was charged with violating chapter 6:7 by publicly disparaging and commenting unfavorably or disrespectfully about the official actions of two superior officers, Deputy Chief Thomas Henry, and Inspector Thomas Critchley, and about the rules, regulations, procedures, and orders of the police department. Specifically, the charges alleged that Gasparinetti said: (1) that police officers were transferred as a result of political pressure brought by a black leader on Critchley; (2) that Critchley attempted to break the morale of the men; (3) that Critchley operated outside the rules and regulations of the department; (4) that men like Critchley could not effectively lead others; and (5) that many superior officers were cowards.[6]

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These remarks, especially the public charge that superior officers were "cowards," were of such character as to undermine public confidence in the leaders of the police force and disturb the working relationship of the rank-in-file to their superiors. As such, these remarks were punishable by the Department. *Pickering* v. *Board of Education, supra* suggests that the governmental interest in limiting speech must outweigh the individual's right to fair comment if application of a rule is to be constitutional. I think that there can be no doubt that in this case Gasparinetti's asserted first amendment rights are outweighed by the Department's need for discipline and order. It is permissible to punish truthful criticism where effectiveness of the employment relationship is undermined. *See Sprague* v. *Fitzpatrick, supra,* 546 F.2d at 565.

IV. Chapters 5:4.1 and 6:8 Need Not Be Enjoined

Disciplinary charges were brought against Gasparinetti under chapter 5:4.1 ("Obedience to Orders") and chapter 6:8 ("Acts of Insubordination")[7] because he refused to make a formal answer to seven questions—presumably concerned with his public statements about his superiors and official policy—put to him by a superior officer. Instead, Gasparinetti claimed that the question asked him

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[6] For the text of Gasparinetti's statements *see* Dissenting Opinion at 23-23, n.3.

[7] For the text of chapters 5:4.1 and 6:8 *see* Majority Opinion at 14.

to reply to areas not subject to scrutiny by the Department. The district court refused to grant an injunction preventing enforcement of disciplinary proceedings against Gasparinetti. The majority apparently remand the question to the district court in light of their reversal of the constitutionality of chapter 6:7. Because I find chapter 6:7 constitutional, I see no need to disturb the district court's refusal to grant the injunction. I would affirm the holding.

V. Conclusion

(1) For the reasons stated by the majority, I concur that chapters 3:1.2-5 and 3:1.2-8 of the Newark Police Department Rules and Regulations are unconstitutionally overbroad.

(2) Chapter 6:7's prohibition of publicly disparaging and publicly commenting unfavorably or disrespectfully is necessary to effectuate the goals of morale, discipline, and public confidence in the Department. The rule is directed at public disparagement; the incidental impact on free speech is mitigated by open access to all private channels of communication. Given the needs of the police, the deference given to regulations of paramilitary organizations, and the limited nature of the intrusion on rights, chapter 6:7 is not overbroad on its face.

(3) The terms of chapter 6:7 are susceptible of understanding by the ordinary man or woman; it is not vague.

(4) Gasparinetti's conduct had the clear effect of undermining morale and discipline on the police force. The Department may therefore discipline him without doing violence to the constitution.

(5) Chapter 6:7 is constitutional in all respects. Therefore the district court's holding refusing to enjoin application of chapters 5:4.1 and 6:8 to Gasparinetti should be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX B

Judgment of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 76-1605/76-1606

RONALD GASPARINETTI and POLICEMEN'S BENEVOLENT ASSOCIATION, LOCAL No. 3,

Appellants in No. 76-1605

vs.

EDWARD KERR, Police Director, City of Newark (on leave) and ANTHONY BARRES, Acting Police Director, City of Newark

Edward Kerr, Police Director, City of Newark (on leave) and Anthony Barres, Acting Police Director, City of Newark and the City of Newark,

Appellants in No. 76-1606

(D. C. Civil No. 74-595)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Appendix B

Present: ALDISERT, ROSENN and GARTH, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on September 6, 1977.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court filed March 2, 1976, be and the same is hereby affirmed in part, reversed in part, and remanded to the district court for further proceedings consistent with the opinion of this Court.

ATTEST:

THOMAS P. QUINN
Clerk

November 3, 1977

Certified as a true copy and issued in lieu of a formal mandate on November 25, 1977.

Test:

FRANCES R. MATYSEK

Deputy Clerk, United States Court of Appeals for the Third Circuit

Appendix B

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Office of the Clerk
Newark, New Jersey

CIVIL No. 74-595

RONALD GASPARINETTI, *et al.*

vs.

EDWARD KERR, *et al.*

There was entered on the docket on November 28, 1977 a certified copy of Judgment of U.S.C.A. in lieu of a mandate affirming in part and reversing in part Order of U.S.D.C. of 3-2-76 and remanding action to the U.S.D.C. for further proceedings.

ANGELO W. LOCASCIO, Clerk

APPENDIX C

Opinion of the United States District Court for the District of New Jersey

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

CIVIL No. 74-595

RONALD GASPARINETTI,

Plaintiff,

v.

EDWARD KERR, Police Director, City of Newark (On Leave) and ANTHONY BARRES, Acting Police Director, City of Newark,

Defendants.

Newark, New Jersey,
December 23, 1975.

By: The Honorable FREDERICK B. LACEY, U. S. D. J.

LACEY, District Judge:

This matter is before the court on application by the plaintiff, Ronald Gasparinetti, for preliminary injunctive

relief.[1] Plaintiffs also seek declaratory relief declaring unconstitutional, both facially and as applied, certain departmental rules and regulations of the Newark Police Department.[2]

Plaintiff Gasparinetti is a Newark police officer and President of that city's Patrolman's Benevolent Association (hereinafter P.B.A.), the exclusive collective bargaining agent for all patrolmen employed by the city of Newark. As P.B.A. President, Gasparinetti is the principal organization spokesman concerning collective bargaining and terms and conditions of employment for Newark policemen. He stands charged with violating five chapters of the Newark Police Department Rules and Regulations because of certain disparaging remarks concerning superiors and the Police Department made in the press and in P.B.A. newsletters during April 1973.

The facts which gave rise to the remarks and subsequent changes are as follows. In January 1973 a dispute arose over the proposed construction of the Kawaida

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[1] Subsequent to the filing of the motion, the complaint was amended pursuant to Fed.R.Civ.P. 15(a) to add the Patrolmen's Benevolent Association, Local 3, as a plaintiff. The P.B.A. alleges as well constitutional injury to itself and its members. *See* Allee v. Medrano, 416 U.S. 802, 819 n.13 (1974). The P.B.A. has not, however, formally joined in the motion for preliminary injunctive relief.

[2] The amended complaint seeks declaratory relief for both plaintiffs. Counsel for both sides have realized the important nature of this issue and recognized that there is no factual dispute on the issue of facial constitutionality of the Rules and Regulations and at oral argument consented to a determination of that issue. The court will treat the matter as if cross motions for summary judgment have been made on this issue.

Towers Housing Complex in the North Ward of the city of Newark. Picket lines went up around the proposed building site and violence broke out between proponents and opponents of the complex. Police were assigned to keep peace at the site but were criticized by both sides for doing too much or too little. Clashes among civilians occurred on a daily basis for several weeks; several policemen were injured.

The primary police functions at the construction site were assigned to the Tactical Force of the Patrol Division under the direction of Inspector Thomas Critchley. When the Kawaida dispute subsided, Deputy Chief Thomas Henry, head of the Patrol Division, transferred six members of the Tactical Force, said to be a prestigious unit, to less prestigious service. The parties dispute the reason for the transfer.

Plaintiffs contend that in March 1973, one LeRoi Jones, also known as Imamu Amiri Baraka, a supporter of the Kawaida project, submitted a list of policemen's badge numbers to the Police Department and told then Acting Police Director Kerr that the policemen were responsible for violence and harassment of certain persons at the Kawaida construction site. Plaintiffs further allege that the six officers, "who were involved in the Kawaida altercation and whose badge numbers were on Jones' list, were transferred from the tactical force." (Plaintiffs' Brief at 2.) While defendants admit that the six were involved in Kawaida altercations, they deny that the badge numbers of the six were on any list compiled by Baraka. Defendants allege that the six were transferred, after the Kawaida unrest had subsided, for their lack of objectivity

during the altercations.[3] It is noted that Gasparinetti was not a member of the Tactical Force, and so far as the record reflects, he had no duties related to, or any police responsibility for, activities germane to the Kawaida situation.

According to the April 1, 1973, edition of the Newark Star-Ledger, Gasparinetti claimed that "the six police officers were transferred after alleged 'pressure brought on Police Inspector Thomas Critchley by LeRoi Jones.'" Gasparinetti also criticized Critchley specifically for succumbing "to political pressure and threats of LeRoi Jones," since by doing so Inspector Critchley was "operating outside the rules and regulations."

As a result of the aforementioned article, a subsequent one which appeared in the same newspaper on April 4, 1973, and an undated P.B.A. Newsletter and P.B.A. Union Notice to the membership, charges were brought against Gasperinetti alleging violations of the following chapters of the Newark Police Department Rules and Regulations:

(I) Chapter 3:1.2-5 Derogatory Reference—

Police officers and civilian employees shall not by manner, gesture, or speech criticize or make derogatory reference to Department orders or instructions either to the public or to other members of the Department.

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[3] The parties have submitted conflicting proffers of proof, incorporating in part affidavits previously submitted to the court. The sole factual issue presented to the court by way of proffers relates to the reasons for the transfer of the six officers. Those reasons are irrelevant to the issues as presented and do not require, at this point in the proceedings, a factual determination.

Under the charges, Gasparinetti allegedly violated this chapter by making

> "a derogatory reference to the Department's orders and instructions . . . [by saying] 'That six (6) police officers were transferred after alleged pressure brought on Police Inspector Thomas Critchley by LeRoi Jones (Imamu Amiri Baraka),' or words to that effect."

(II) Chapter 3:1.2-8 Censuring Official Transaction—

Unless in accord with official duties, police officers and civilian employees shall not, either in writing or discussion, censure other Department members concerning official transactions within the Department.

Gasparinetti, in the April 1, 1973, edition of the Newark Star-Ledger, according to the police charges, criticized Deputy Chief Thomas Henry and Inspector Thomas Critchley of the Newark Police Department concerning official transactions by making the following "unsubstantiated allegations":

1. "That six (6) police officers were transferred after alleged pressure brought on Police Inspector Thomas Critchley by LeRoi Jones (Imamu Amiri Baraka," or words to that effect.
2. "That Inspector Critchley was assigned to the Tactical Squad in order to break the morale and spirit of the men," or words to that effect.
3. "Wherein I will prove that Inspector Critchley and Deputy Chief Henry use deceit, lies, and circum-

vented our labor contract to disgrace a number of very proficient police officers," or words to that effect.

(III) Chapter 6:7 PUBLIC DISPARAGEMENT—

Department members shall not publicly disparage or comment unfavorably or disrespectfully on the official action of a superior officer, nor on the Rules, Regulations, Procedures or Orders of the Police Department.

Gasparinetti allegedly violated this chapter by publicly disparaging and commenting unfavorably and disrespectfully on the official actions of two superior officers, Deputy Chief Thomas Henry and Inspector Thomas Critchley, and on the Rules, Regulations, Procedures and Orders of the Police Department, in that he said:

1. "When a man such as Critchley succumbs to political pressure and threats of LeRoi Jones, then he is operating outside the Rules and Regulations," or words to that effect.
2. "The public wants to know why the police department doesn't do its job. Well, this is a very big part of the answer. We have the men that are willing to face the criminals but when they are led by superiors like Critchley they hesitate," or words to that effect.
3. "We picketed to let people know we have cowards in superior ranks," or words to that effect.

(IV) Chapter 5:4.1 OBEDIENCE TO ORDERS—

Police officers or civilian employees shall promptly and fully obey any lawful order directed to them by a superior officer.

Gasparinetti allegedly violated this chapter by failing to promptly and fully obey a lawful order directed to him by a superior officer, Inspector George Graf, to submit an "Administrative Submission" with his answers to the seven questions asked of him by the Inspector. Instead, Police Officer Gasparinetti had submitted a letter.

(V) Chapter 6:8 ACTS OF INSUBORDINATION—

Department members shall not commit acts of insubordination or disrespect to any superior officer (as defined in Chapter 2:1.10 of the Rules and Regulations).

Acts of insubordination and disrespect (as defined in Chapter 2:1.10 of the Rules and Regulations) were allegedly committed by Gasparinetti when he "wilfully disobeyed" an order from Inspector George Graf, a superior officer, to submit an "Administrative Report" through channels with answers to seven questions asked him by the Inspector. The letter written by Gasparinetti in lieu of the "Administrative Report" was not accepted by the Police Department.

After the aforementioned charges were preferred, but before the commencement of a disciplinary hearing, plaintiff Gasparinetti brought this action under 42 U.S.C. §§ 1983 and 1985, alleging a jurisdictional predicate of 28 U.S.C. § 1343. The P.B.A. then joined Gasparinetti as a plaintiff. In the amended complaint, plaintiffs seek an injunction against the enforcement of Chapters 5:4.1 and 6:8 on the grounds that they are being used to thwart Gasparinetti's exercise of his first amendment rights. Plaintiffs seek as well an injunction and declaration that

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Chapters 3:1.2-5, 3:1.2-8 and 6:7 are unconstitutionally vague and overbroad, and violative of Gasparinetti's first amendment and due process rights. Additionally, plaintiffs request compensatory and punitive damages and, by way of preliminary relief, the enjoining of the enforcement of all five chapters *pendente lite*.[4]

This matter is properly before the court under 28 U.S.C. § 1343 and 42 U.S.C. § 1983. In this proceeding I find no requirement that plaintiff exhaust his administrative remedies. *Houghton* v. *Shafer,* 392 U.S. 639 (1968); *Damico* v. *California,* 389 U.S. 416 (1967); *McNeese* v. *Board of Education,* 373 U.S. 668 (1963); *Monroe* v. *Pape,* 365 U.S. 167 (1961).[5] Nor is the instant application barred by the federal anti-injunction statute, 28 U.S.C. § 2283. *Mitchum* v. *Foster,* 407 U.S. 225 (1972).

Two threshold questions must be resolved, however, before the issue of the constitutionality of the various rules and regulations at issue can be decided. This court must determine whether plaintiffs Gasparinetti and the P.B.A. have standing to challenge the rules and regulations and, assuming standing *arguendo,* whether this court should abstain from determining the issues raised on *Younger* v. *Harris* (401 U.S. 37 (1971)) principles. *See Schlesinger* v. *Councilman,* 420 U.S. 738 (1975); *Huffman* v. *Pursue, Ltd.,* 420 U.S. 592 (1975); *McCune* v. *Frank,* 521 F.2d 1152 (2d Cir. 1975); *Anonymous* v. *Association of the Bar of the City of New York,* 515 F.2d 427 (2d

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[4] The departmental hearing was stayed by agreement of the parties pending determination of the matter.

[5] *Cf.* Eisen v. Eastman, 421 F.2d 560 (2d Cir. 1969), cert. denied, 400 U.S. 841 (1970).

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Cir. 1975); *Anonymous J.* v. *Bar Association of Erie County,* 515 F.2d 435 (2d Cir. 1975), *cert. denied,* 44 U.S. L.W. 3202 (U.S. Oct. 7, 1975).

Standing

While it may be argued that Gasparinetti, the movant, flagrantly violated the regulations in question and is, therefore, not entitled to attack them (*see Parker* v. *Levy,* 417 U.S. 733, 756 (1974); *Arnett* v. *Kennedy,* 416 U.S. 134, 158-163 (1974); *Smith* v. *Goguen,* 415 U.S. 566, 577-78 (1974); *Dombrowski* v. *Pfister,* 380 U.S. 479, 491-92 (1965)), or that the regulations are not overbroad as applied to him, *Paulos* v. *Breier,* 507 F.2d 1383, 1386-87 (7th Cir. 1974), I find that plaintiff has exhibited the requisite standing to challenge the facial validity of the regulations. As the Supreme Court recently stated in *Doran* v. *Salem Inn, Inc.,* 43 U.S.L.W. 5039 (422 U.S.) (U.S. June 30, 1975):

> We have previously held that even though a statute or ordinance may be constitutionally applied to the activities of a particular defendant, that defendant may challenge it on the basis of overbreadth if it is so drawn as to sweep within its ambit protected speech or expression of other persons not before the Court. As we said in *Grayned* v. *City of Rockford,* 408 U.S. 104, 114 (1972):
>
> > Because overbroad laws, like vague ones, deter privileged activity, our cases firmly establish appellant's standing to raise an overbreadth challenge.

43 U.S.L.W. at 5042.

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See also United States v. *Raines,* 362 U.S. 17, 22-24 (1960).

Obviously, plaintiff Gasparinetti has standing to raise his challenge to Chapters 5:4.1 and 6:8 as they are applied to him.

Furthermore, the P.B.A., alleging constitutional injury to its members, has standing to seek declaratory relief, *Allee* v. *Medrano,* 416 U.S. 802, 819, n. 13 (1974); *NAACP* v. *Button,* 371 U.S. 415, 428 (1963); *Louisiana ex rel. Gremillion* v. *NAACP,* 366 U.S. 293, 296 (1961).

Abstention

Principles of comity and equitable restraint made applicable to state criminal proceedings in *Younger* v. *Harris,* 401 U.S. 37 (1971) are equally applicable to certain civil proceedings. *Huffman* v. *Pursue, Ltd., supra.* To term a local police disciplinary proceeding quasi-criminal or civil in nature, (*see Young* v. *Paterson,* 132 N.J. Super. 170 (App. Div. 1975)), however, gives little guidance in determining whether this court should grant the requested injunctive relief. Assuming that such a disciplinary proceeding is civil in nature, this court must determine, in line with *Huffman,* whether "an offense to the State's interest in [this litigation] is likely to be every bit as great as it would be were this a criminal proceeding." 420 U.S. at 604. Were the hearing a state judicial proceeding or one to enforce a state statute, *Huffman, supra,* whether in the courts or the state administrative machinery, *Geiger* v. *Jenkins,* 401 U.S. 985 (1971), or one adjunct to a state judicial function, *Anonymous* v. *Association of the Bar of The City of New York, supra,*

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Anonymous J. v. *Bar Association of Erie County, supra,* I would abstain from deciding the constitutional issues posed, leaving plaintiff to assert his constitutional claims within the state system. The proceeding in question, however, is narrowly local, possessing none of the "state interested" aspects requiring *Huffman* abstention. Although the Second Circuit recently intimated that it might apply the *Younger-Huffman* analysis to a local police disciplinary hearing, *see McCune* v. *Frank, supra,* it is my opinion that such a reading of *Huffman* strains that holding too far; and, accordingly, I deem it inappropriate to apply a *Younger*-type abstention in this case.

Constitutionality

Plaintiffs attack chapters 3:1.2-5, 3:1.2-8 and 6:7 as facially vague and overbroad. These regulations will be treated in inverse order.

Preliminarily, it is important to note that, in the context of this litigation, the recent Supreme Court "overbreadth" decisions, *Arnett* v. *Kennedy,* 416 U.S. 134 (1974), *Parker* v. *Levy,* 417 U.S. 733 (1974), *CSC* v. *National Association of Letter Carriers,* 413 U.S. 548 (1973), and *Broadrick* v. *Oklahoma,* 413 U.S. 601 (1973), are inapposite. In those cases the Court had the benefit of prior administrative interpretation, legislative history and the availability of employee guidance as a background for its determinations. *See Alderman* v. *Philadelphia Housing Authority,* 496 F.2d 164 (3d Cir. 1974). Such interpretive aids are unavailable here. Without the benefit of prior limiting interpretation, this court must look for guidance only to the words of the rules and regulations in question.

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In *CSC* it was recognized that private speech fell without the proscription of the Hatch Act. 413 U.S. at 576 n. 21, citing 5 C.F.R. § 733.111(a)(2). In *Arnett* the Supreme Court, in construing the Lloyd-LaFollette Act, recognized that the Act proscribes only that public speech which improperly damages and impairs the reputation and efficiency of the employing agency and thus "imposes no greater controls on the behavior of federal employees than are necessary for the protection of the Government as an employer." 416 U.S. at 162. In construing the federal statute, the Court in *Arnett* specifically held that the Lloyd-LaFollette Act excluded from its ambit constitutionally protected speech. *Id.*

In *Broadrick* the Supreme Court relied heavily upon the authoritative state pronouncements, in the form of administrative determinations, holding private speech outside the scope of a state statute similar to the Hatch Act. It stated "We do not believe that § 818 must be discarded *in toto* because some persons' arguably protected conduct may or may not be caught or chilled by the statute. Section 818 is not *substantially* overbroad. . . ." 413 U.S. at 618. In *Arnett, Parker, CSC* and *Broadrick,* the Court in discussing overbreadth specifically found that the conduct of the various appellants clearly violated the statutes challenged. Even assuming *arguendo* that Gasparinetti's speech or conduct was clearly within the parameters of the rules and regulations which he is accused of violating, so that the *Arnett-Parker-CSC* rationale would be applicable to him, a similar holding could not be applied to the P.B.A., which also applies for declaratory relief.

This court is not unmindful that "there are limitations in the English language with respect to being both specific and manageably brief," *see CSC* v. *Letter Carriers,* 413

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U.S. at 578-79; *Arnett* v. *Kennedy,* 416 U.S. at 159, but it is also mindful that a facially overbroad (or vague) regulation cannot pass constitutional muster since

> even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.

Shelton v. *Tucker,* 364 U.S. 479, 488 (1960) (footnote omitted). *See also NAACP* v. *Button,* 371 U.S. 415, 433 (1963); Note, *The First Amendment Overbreadth Doctrine,* 83 Harv. L. Rev. 844 (1970).

It is also important to note that although "policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights," *Garrity* v. *New Jersey,* 385 U.S. 493, 500 (1967), the state and, *a fortiori,* the local police department have a legitimate interest in balancing the policeman's right to freedom of speceh with that of the state and local police department to regulate to some degree the speech of its employees for the purpose of promoting the efficiency of the service, maintaining discipline, fostering harmony among co-workers and exacting loyalty and confidence both within and without the governmental agency. *See Pickering* v. *Board of Education,* 391 U.S. 563 (1968). *See also Paulos* v. *Breier,* 507 F.2d 1383 (7th Cir. 1974); *Magri* v. *Giarrusso,* 379 F. Supp. 353 (E.D. La. 1974). This court must balance "the interests of the [police officer], as a citizen, in commenting upon matters of public concern and the interest of the [police department] as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering* v. *Board of Education,* 391 U.S. at 568.

With the foregoing in mind, this court determines that Chapter 6:7, "Public Disparagement" is facially valid under the traditional overbreadth and vagueness analyses. Chapter 6:7 is plainly legitimate in scope. *Cf. Magri* v. *Giarrusso, supra.* A policeman is invested with a special public trust. He is not only an enforcer of the law but serves, by his station, as a symbol of order and stability. Confidence in the local police, individually and collectively, and in their ability to function, is a foundation for the public's confidence in law enforcement generally. In that regard Chapter 6:7 is, in this court's view, directed only to that area of a policemen's speech, the public area, where a publicizing of intra-department strife would tend to diminish confidence in the functions and operations of the police department by the public at large. The Supreme Court in *Pickering* intimated that in certain instances and employment circumstances even correct public statements by governmental employees would be sufficient, in and of themselves, to be the proper subject of discipline. 391 U.S. at 570 n. 3. I find that such a restraint is warranted here.

I do not find that Chapter 6:7 sweeps too broadly in effectuating the legitimate scope of governmental activity discussed *supra.* It does not stifle dissent or criticism. There are still appropriate intra-department avenues of redress and correction. *Cf. Muller* v. *Conlisk,* 429 F.2d 901 (7th Cir. 1970). Nor does it mute the policeman, either individually or collectively, from criticizing non-police public officials and policies. It limits only criticism and disparagement of police officers and police business.

Nor do I find that Chapter 6:7 is unconstitutionally vague. As drawn, the wording is not such that men and

women "of common intelligence must necessarily guess at its meaning." *Connally* v. *General Construction Co.,* 269 U.S. 385, 391 (1926). It is "set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest." *CSC* v. *Letter Carriers,* 413 U.S. at 579. Applicable is the following from *Arnett* v. *Kennedy,* 416 U.S. at 161, quoting from *Meehan* v. *Macy,* 392 F.2d 822, 835 (D.C. Cir.), *modified,* 425 F.2d 469 (D.C. Cir. 1968), *aff'd,* 425 F.2d 472 (1969):

> [I]t is not feasible or necessary for the Government to spell out in detail all that conduct which will result in retaliation. The most conscientious of codes that define prohibited conduct of employees include [sic] "catchall" clauses prohibiting employee "misconduct," "immorality," or "conduct unbecoming." We think it is inherent in the employment relationship as a matter of common sense if not common law that [a Government] employee . . . cannot reasonably assert a right to keep his job while at the same time he inveighs against his superiors in public with intemperate and defamatory [statements].

In *United States* v. *Harriss,* 347 U.S. 612 (1954), the Supreme Court stated:

> [I]f the general class of offenses to which [the provisions are] directed is plainly within [their] terms, [they] will not be struck down as vague, even though marginal cases could be put where doubts might arise.

347 U.S. at 618.

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I find Chapter 6:7 to be reasonably specific, giving Newark Police officers sufficient guidance with which they might determine their course of conduct.

For the foregoing reasons, the facial constitutionality of 6:7 must be sustained.

Chapters 3:1.2-5 and 3:1.2-8, however, are not so narrowly drawn. Chapter 3:1.2-5 "Derogatory References" forbids criticism of departmental orders or instructions to, *inter alia,* other members of the department. Although it can be argued that the legitimate purpose of this regulation is to maintain discipline and obedience to orders as well as to avoid formenting of unrest among the lower echelon police officers, the regulation sweeps too broadly and, as such, is constitutionally infirm. The regulation does not distinguish between the public and private speech of a police officer, *see Muller* v. *Conlisk, supra, Magri* v. *Giarrusso, supra, Flynn* v. *Grarrusso,* 321 F. Supp. 1295 (E.D. La. 1971); it does not facially permit the verbalizing of intra-departmental grievances or allow a policeman to approach his P.B.A. officers. Police officers may not, according to the regulation, complain of orders, valid or invalid which affect them and against which they have a P.B.A. to redress what they believe are grievances. Furthermore, as drawn, it does not foster that legitimate governmental purpose of instilling public confidence in the police functions. Internal loyalty within the police department is a proper and legitimate governmental function but such loyalty cannot be extracted from police officers, whether they are considered members of a quasi-military organization or not, by a regulation which facially would negate first amendment rights to speak privately one's mind, and to work within the confines of the police hierarchy to seek correction of grievances. As the Seventh Circuit Court of Appeals stated in *Muller* v. *Conlisk.*

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> To the extent that being a policeman is public employment with unique characteristics, the right of the employee to speak on matters concerning his employment with the full freedom of any citizen may be more or less limited. It is not, however, destroyed.

429 F.2d at 904.

Similarly, Chapter 3:1.2-8, "Censuring Official Transaction," is overbroad. It suffers from the same infirmities as does 3:1.2-5. Although it arguably allows for intradepartmental grievance procedures, it does not distinguish between public and private speech, nor does it facially allow speech between an individual and his P.B.A. representative concerning conditions of employment, where censure of other members of the police department might be warranted.

Having determined that Chapters 3:1.2-5 and 3:1.2-8 are overbroad, I need not pass on plaintiffs' vagueness claim.

Preliminary Injunction

Plaintiff Gasparinetti moves for a preliminary injunction enjoining *pendente lite* the five regulations, alleging that they, as applied to him, are violative of his first and fourteenth amendment rights. Only Chapters 5:4.1, 6:7 and 6:8 are now applicable.

This court recently reiterated the standards necessary for consideration on an application for preliminary injunction. In *United States* v. *Caribbean Ventures, Ltd.,* 387 F. Supp. 1256 (D. N.J. 1974), the court stated:

Traditionally, a preliminary injunction will not ordinarily issue except on a showing that the party seeking this extraordinary relief will be irreparably injured *pendente lite* if his application is denied. . . . There must be shown, however, in addition to the alleged satutory violation, that there is a resonable probability of eventual success on the merits *and that the public interest favors granting the relief thus sought.* Penn Galvanizing Co. v. Lukens Steel Co., 468 F.2d 1021, 1023 (3d Cir. 1972); Winkleman v. New York Stock Exchange, 445 F.2d 786, 789 (3d Cir. 1971); A. L. K. Corp. v. Columbia Pictures Industries, Inc., 440 F.2d 761, 763 (3d Cir. 1971); Mixing Equipment Co. v. Philadelphia Gear Inc., 436 F.2d 1308, 1315 (3d Cir. 1971); U. S. Steel Corp. v. Fraternal Ass'n of Steelhaulers, 431 F.2d 1046, 1048 (3d Cir. 1970); Nelson v. Miller, 373 F.2d 474, 477 (3d Cir. 1967), cert. denied, 387 U.S. 924, 87 S.Ct. 2042, 18 L.Ed.2d 980 (1967); Kontes Glass Co. v. Lab Glass, Inc., 373 F.2d 319, 320 (3d Cir. 1967); Ikirt v. Lee National Corp., 358 F.2d 726, 727 (3d Cir. 1966); Joseph Bancroft & Sons Co. v. Shelly Knitting Mills, Inc., 268 F.2d 569, 573-574 (3d Cir. 1959); Warner Bros. Pictures, Inc. v. Gittone, 110 F.2d 292, 293 (3d Cir. 1940).

With regard to 6:7, "Public Disparagement," I find that plaintiff has not shown a substantial likelihood of success on the merits. As indicated *supra,* the balancing of rights required by *Pickering* pends heavily in favor of proscribing public disparagement and criticism by police officers of police officers and police business. Additionally, the present harm to the plaintiff—that of being subject to a disciplinary proceeding for alleged violations of 6:7, for which he might eventually be found guilty—is outweighed by the interest of the public in an untarnished confidence in its police force and police functions. *See Fitzgerald* v. *Cawley,* 368 F. Supp. 677, 681 (S.D. N.Y. 1973). In the context of this litigation, under *Pickering,* I find no irreparable harm to the plaintiff. His areas of criticism are not negated but are narrowly, and properly, curtailed.

Plaintiffs contend that Chapters 5:4.1 and 6:8 are being utilized as punishment for and to chill the exercise of Gasparinetti's first amendment rights to freedom of speech and association. Assuming *arguendo* the truth of these allegations, I find that plaintiff has not shown, at this stage, that irreparable injury necessary to grant preliminary injunctive relief. Gasparinetti has not been suspended or otherwise relieved of his duties as a police officer. Since the matter came before time for the first time, Gasparinetti has sought and won re-election as P.B.A. President. This court is not oblivous to the fact that plaintiff as P.B.A. President has within the last several months made public statements to the press concerning police matters. Finally, it has not yet been determined whether the charged violations can be substantiated. As the Second Circuit recently stated in *Fuentes* v. *Roher,* 519 F.2d 379 (2d Cir. 1975):

> "a discharge motivated only in part by demonstrable retaliation for exercise of speech and associational rights is . . . offensive to the Constitution." We do believe, however, that application of that doctrine should await a more conclusive showing that the plaintiff has actually been affected by state action in response to his exercise of protected rights.

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519 F.2d at 391 n. 7 (citing *Simard* v. *Board of Education of Town of Groton,* 473 F.2d 988, 995 (2d Cir. 1973)).

Accordingly, plaintiff Gasparinetti's motion to enjoin *pendente lite* enforcement of Chapters 5:4.1, 6:7 and 6:8 is denied. Plaintiffs' prayers for declaratory and permanent injunctive relief concerning the facial unconstitutionality of Chapters 3:1.2-5 and 3:1.2-8 are granted.

It was written and sung in Pirates of Penzance, Act II, that:

> When constabulary duty's to be done,
> The policeman's lot is not a happy one!

Today this is particularly so. Underpaid, overworked, victimized by the destructive anti-authoritarian subculture, attacked by treacherous forces who see the "man in blue" as the visible symbol of our government in action, the police officer goes about his task, protecting property, saving lives, affording by his very presence a sense of security and an assurance that we are a government, not a chaotic society. In heated and emotional confrontations he must make instant decisions. He cannot debate at length in legislative halls, executive offices, or judicial chambers which of two delicately balanced courses of action is right for that occasion. He must act then and there. His reputation, his career and his life are daily in jeopardy. He must maintain his composure and his calm resolve while standing in the midst of chaotic disorder, often contrived to provoke him into an intemperate response. Yet day by day he serves as society's bulwark against the lawless. For all these reasons, this court has unbounded respect for the policeman.

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It is for the same reasons that there must be within the police ranks a mutual respect between superior officers and their subordinates; a discipline that commands with firmness softened by understanding; a recognition by department spokesmen that highly publicized intramural bickering diminishes *all* the police in the public's eyes.

Submit an appropriate order in conformity with this opinion.

Dated: December 23, 1975.

FREDERICK B. LACEY,
United States District Judge.